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**POLICY BRIEF
CONTRACT MANAGEMENT**

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ACRONYMS

BOT	Build Operate Transfer
DENR	Department of Environment and Natural Resources
DOF	Department of Finance
DPWH	Department of Public Works and Highways
EPC	Engineering, Procurement and Construction
EO	Executive Order
EU	European Union
IA	Implementing Agency
IRR	Implementing Rules and Regulations of the BOT Law
JV	Joint Venture
GFI	Government Financial Institution
GOCC	Government-Owned and Controlled Corporations
GPH	Government of Philippines
KPI	Key Performance Indicators
LGU	Local Government Unit
LRTA	Light Rail Transit Authority
MPSS	Minimum Performance Standards and Specifications
M&E	Monitoring and Evaluation
NEDA	National Economic and Development Authority
ODA	Official Development Assistance
OGCC	Office of the Government Corporate Counsel
OSG	Office of the Solicitor General
PMU	Project Management Unit
PNR	Philippine National Railways
PPA	Philippine Ports Authority
PPP	Public Private Partnership
PPP PRU	Performance Review Unit
SUC	State Universities and Colleges
TL	Team Leader
VfM	Value for Money

1.0 OBJECTIVE OF POLICY BRIEF

1. The objective of this policy brief is to formalize a policy for the management, monitoring, evaluation and administration of public private partnership (PPP) contracts, post tender to project termination.

1.1 Scope of Policy Brief

2. This policy brief will focus on those functions that are not well described elsewhere, but will not include the Monitoring and Evaluation (M&E) function to be assumed by PPP Center. M&E will be described in a separate Policy Brief which will focus specifically on what roles Implementing Agencies (IAs) and the PPP Center share in monitoring project implementation and setting policy, procedures, rules and actions.
3. The Contract Management function extends over four distinct phases, namely:
 - a. **Contract preparation stage** - where terms and conditions are established governing the project preparation, solicitation, award, contract signing and the settlement of conditions precedent to the effective date of the contract;
 - b. **Pre-construction and construction** - a period extending from the award of contract to the commissioning stage, where progress in respect of the negotiation of key project and finance documents takes place and the mobilization of finance is monitored by the Contract Management team. During construction, lenders and the IA agree to hire an independent consultant to appraise the progress made by the engineering, procurement and construction (EPC) contractor during construction and, based on this evaluation, authorizing progress payments to the latter. This process is not to be confused, however, with the M&E conducted over the construction period by the PPP Center or NEDA (if one or more components of the project's construction is funded from ODA sources) and subsequently, through operations;
 - c. **Operations stage** –starts when the plant is commissioned and ends when the contract terminates. It involves the post-commissioning delivery of contracted services, adherence to the project documents and finance agreements. Active M&E yields important information regarding the extent to which the project is meeting its commercial objectives, is continuing to deliver quality services at a value for money (VfM) cost, and meeting minimum performance standards and specifications (MPSS) with regard to environment, gender, resettlement, and project affected peoples;
 - d. **Transfer stage** - where the transfer to Government of the Philippines (GPH) of the business and its assets takes place (unless the government exercises its option to extend, or re-tender, the PPP contract).

1.2 Role and Functions of Contract Management

4. Contract management consists for 4 distinct roles and functions. These roles and functions include; (a) Monitoring and Evaluation, (b) Contract Administration, (c) Project Management, and (d) Contract Structuring. These specific roles and function are as follows:
 - a. **Monitoring and Evaluation** is the role of the IA, but it is coordinated and facilitated by the PPP Center. M&E includes the process of reviewing reports, outputs and deliverables and entails maintaining documentation for the progress of each national PPP project as well as any other PPP project

undertaken by any other IA including any GOCC, GFI, SUC or LGU, and maintaining an adequate staff with clear cut M&E responsibility;

- b. **Contract Administration** is the role of the IA, but it is coordinated by the PPP Center. Contract Administration refers to certain activities related to managing the project agreement more precisely as defined below;
- c. **Project Management** is the responsibility of the project proponent's designated EPC contractor supervised by the project proponent and coordinated in cooperation with the IA. Project management is the discipline of planning, organizing, securing, managing, leading, and controlling resources to achieve specific goals;
- d. **Contract Structuring** is the responsibility of the IA in conjunction with the PPP Center and affiliated agencies. Contract structuring requires understanding the value and risks inherent in a PPP agreement and designing the engagement with private sector actors to effectively manage risks to enhance the value to all parties.

2.0 DEFINITION OF TERMS

5. DEFINITIONS USED IN THIS POLICY BRIEF:

- a. **APPROVING BODY** refers to that body which approves PPP projects for tender at the national or local government unit (LGU) level in Sections 2.7 and 2.8 of the Revised BOT Law IRR;
- b. **CONTRACT ADMINISTRATION** refers to those ad hoc duties that may arise during construction and operations that involve changes in the project agreement or base case financial model such as coordinating requests for variations during construction or operations, as and when needed. Changes in the project agreement or base case financial model may also occur with the; a) refinancing of the project, b) implementation of agreed principles relative to the sharing of refinancing gains and/or, c) restructuring of the project agreement as necessary following force majeure or change in law. Contract administration also involves supervising asset handover at the expiry of the contract; supervising early termination activity and confirming accuracy of related termination payments; assisting in the management of disputes and their resolution; and any other non-routine activity for which special time, focused attention and the drafting of recommended actions are needed;
- c. **CONTRACT MANAGEMENT**, an activity that includes several functions, namely: (a) drafting, approval and execution of a solicited or unsolicited PPP contract, (b) M&E of a PPP project during its life cycle, and (c) contract, or project, administration. The Revised implementing rules and regulations (IRR) of the BOT Law assigns responsibility for (a) and (b), but does not address (c). Although responsibility is assigned for (b), the scope and content of this responsibility is not fully described;
- d. **EARLY TERMINATION** means the termination of the project prior to the expiry date of the project agreement either because of an event of default by a party or, otherwise, as a result of a force majeure;
- e. **FACILITY AGREEMENT** means the loan agreement entered into by the syndicate of the lenders with the project company;
- f. **FORCE MAJEURE** is the basic concept which provides the parties of a contract relief where forces of nature or other extraordinary forces outside the control of the parties (such as war) prevent contract performance. Standard "force majeure" language includes: Neither Party shall be liable or be able to terminate this contract for any failure to perform hereunder where such failure is proximately caused by a

Force Majeure Occurrence. A "Force Majeure Occurrence" shall mean an occurrence beyond the control and without the fault or negligence of the party affected and which by exercise or reasonable diligence the said party is unable to prevent or provide against. Without limiting the generality of the foregoing, force majeure occurrences shall include: acts of nature (including fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, acts of foreign combatants, terrorists acts, military or other usurped political power or confiscation, nationalization, government sanction or embargo, labor disputes of third parties to this contract, or the prolonged failure of electricity or other vital utility service. Any Party asserting Force Majeure as an excuse to performance shall have the burden of proving proximate cause, that reasonable steps were taken to minimize the delay and damages caused by events when known, and that the other Party was timely notified of the likelihood or actual occurrence which is claimed as grounds for a defense under this clause;

- g. **JOINT VENTURE (JV)** means a legal agreement known as a Joint Venture Agreement involving an IA or IAs and a private party or parties agreeing to develop a new project, entity and/or asset by cooperating, for a finite time, to develop, design, construct, implement, operate and maintain the project, entity or assets. The parties exercise control over the project, entity or assets and share revenues, expenses, assets and profits in accordance with the revenue, cost, asset and profit sharing clauses in the Joint Venture Agreement;
- f. **IMPLEMENTING AGENCY** means any unit of GPH with the mandate and authority to identify, select, prioritize, prepare, tender, negotiate and execute a PPP project agreement with a private entity. This can be a Department as in the case of DPWH, or a government owned and controlled corporation (GOCC) as in the case of Philippine Ports Authority (PPA), Light Rail Transit Authority (LRTA) or Philippine National Railways (PNR). It can also be any Government Financial Institution (GFI), State University or Colleges (SUC) or LGU;
- g. **MONITORING AND EVALUATION (M&E)** means a component activity of Contract Management, involving periodic reports submitted by the project company and visits to the project company to monitor and assess its performance in areas where it has specific obligations, as set forth in the project agreement. It also entails maintaining documentation for the progress of each national PPP project as well as any other PPP project undertaken by any other IA including any GOCC, GFI, SUC or LGU and maintaining an adequate staff with clear cut M&E responsibility;
- h. **PPP CONTRACT-** The umbrella contractual arrangement in a PPP, around which all other contractual arrangements must dovetail;
- i. **REFINANCING GAINS** means the sharing of gains made by the project as a result of the re-financing, or restructuring, of its capitalization at some time after construction, or during the operating period;
- j. **RESTRUCTURING** means a change in the capital structure of a project, involving a proportionate increase in the amount of debt relative to equity in the case of a refinancing; or conversely, the amount of equity relative to total capital in the event the project becomes distressed;
- k. **RISK MANAGEMENT FRAMEWORK** is a risk management program for a PPP project that has the purpose of developing a life-cycle risk management framework that results in the realization of VfM and a risk-reward balance between different stakeholders. It identifies and prioritizes project risk, develops action plans for dealing with the risk, and allocates responsibility to specific individuals for implementing the agreed plans should the risk occur.

3.0 CURRENT SITUATION

6. This paper is aimed at determining what contract management functions the PPP Center is currently engaged in and what their ultimate role should be in Contract Management. At present, the PPP Center, under the Revised IRR, is only responsible for Monitoring and Coordination of PPP Projects with no further role in Contract Management. While we have provided guidance on M&E and the more inclusive role of the PPP Center with regard to M&E in another paper, there is as yet no guidance on the totality of the PPP Center's role within the entire Contract Management function. This paper seeks to detail the role of the PPP Center in Contract Administration and recommend specific responsibilities that the PPP Center should have, when combined with its M&E role, over Contract Management. For clarity, the combination of Contract Administration and M&E encompasses the entire Contract Management Function. For purposes of this analysis we concentrate solely on contract administration.
7. Contract administration encompasses project design, managing design specifications, construction, Engineering, Procurement and Construction (EPC) progress appraisal, VfM analysis and monitoring, Minimum Performance Standards and Specifications (MPSS) review, asset transfer and amendments to project agreements or financial models.
8. **Project Design** – would normally be the responsibility of the IA whose responsibility it is to prepare a conceptual design and review the detailed engineering design from the winning bidder. The IA would approve or request revisions of the detailed engineering design to meet Philippine standards and specifications.
9. **EPC progress appraisal** – is a review of the project's engineering, procurement and construction to determine if the project is proceeding in accordance with the construction schedule. Normally independent design engineers, procurement specialists and construction engineers would appraise the progress against the work plan devised by the project proponent. The independent consultant would report progress to the IA and note any differences from the EPC contractor's schedule.
10. **VfM analysis** – is the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirements.¹ VfM is not the choice of goods and services based on the lowest cost bid but takes into account the efficiency and effectiveness of the service required. VfM will be determined by the IA in cooperation with the PPP Center.
11. **MPSS review** – are contractual indicators for operating PPP agreements that the private sector proponent must achieve under the contract. These MPSS are both qualitative and quantitative and often include design regulations, environmental standards, obtaining clearance, conforming to design and development standards, environmental standards, social and economic requirements and other matters. Monitoring performance standards is the responsibility of the IA.
12. **Asset transfer** – is the act of transferring ownership and all rights, duties and obligations to the public sector at the termination of the agreement. Termination can be for cause or at the end of the contract term. However, strict rules and requirements are necessary at termination. Rules normally require an independent appraisal of the value of the assets transferred and acceptance of transfer by the IA. Asset transfers require an analysis of risk transferred along with assets and an agreement as to which party should bear the costs involved.

¹ <http://www.government-accounting.gov.uk/current/frames.htm>

13. **Amendments to contracts or financial models** – represent changes to the PPP Contract or the base case financial model. Normally these have implications for performance, costs and user fees. Generally any such changes should be agreed first by the IA then by DOF.

4.0 ISSUES

14. Although the EO 8 and the Revised BOT Law IRR are quite clear about the function of the PPP Center in respect of coordination and monitoring, it is less so regarding the overall Contract Management, Contract Administration function, which is fragmented with several agencies having a role. For example:
- a. The **Approving Body**, as specified by law, approves projects for tender, and any variations pre- or post-construction that are not specifically within the purview of the IA. For national projects, this would be the ICC or the NEDA Board;
 - b. The **Office of the Government Corporate Counsel (OGCC)** and the **Office of the Solicitor General (OSG)** ensure the project agreement is legally enforceable and, presumably, review any and all changes to the contract that occur after Financial Close as a result of the Contract Administration function;
 - c. **Department of Finance (DOF)** approves the project agreement's commercial terms before the project is executed, and (although the Revised IRR is silent on the matter) **should review any changes in the contract, or the base case financial model, that become necessary after Financial Close**;
 - d. **The PPP Center** monitors and coordinates IA compliance to the Contract. Although the Revised IRR is silent on the matter, **the PPP Center should have a role to play if, after Financial Close, there are changes in the base case financial model and DOF requires assistance in this regard**;
 - e. **The IA** is the contract administrator, **but it is not clear from the IRR who oversees its functions if the project becomes distressed, or it becomes necessary to negotiate changes in the project agreement, base case financial model or a dispute resolution event takes place.**
15. A key concern is that the logistical steps required to coordinate, negotiate, manage and/or approve (in conjunction with the lenders) any unanticipated changes in the project agreement, or the base case financial model during construction or operations, are not defined sufficiently for non-routine Contract Administration events, such as:
- a. IA-agreed principles relative to the sharing of refinancing gains, following a restructuring of capital by the project company;
 - b. Restructuring of the Contract and the base case financial model, as necessary, following force majeure;
 - c. Supervising early termination activity and confirming accuracy of related termination payments;
 - d. Change-in-law modifications to the tariff and the base case financial model;
 - e. Contract variations brought about by management of disputes and their resolution.
16. While any changes in the Contract or base case financial model have to be communicated to the PPP Center, it appears as if the IA deals with this function unilaterally. Although not explicitly stated in the IRR, the

assumption is that any changes in the financial model, or project agreement, brought about by the above, or other, similar events would be negotiated by the IA, with the participation of the Approving Body, OGCC or OSG, as appropriate, and DOF for national projects, LGU projects approved by ICC and/or those requiring government support. In other words, the requirements that held for initial contract approval and execution guidelines for national or LGU projects, as set forth in the IRR, should also hold for the above non-routine events.

17. Other matters regarding the drafting of the Revised IRR requiring attention are summarized in Table 1.

**Table 1
Review of Revised IRR Provisions that Relate to Contract Management**

AMENDED IRR PROVISIONS	COMMENTS ON THE AMENDED IRR OF THE BOT LAW
<p>SECTION 2.8 - APPROVAL OF CONTRACTS</p> <p>The Head of the Agency/LGU shall review and approve the Draft Contract which shall be based on the parameters, terms and conditions set forth by the Approving Body.</p> <p>Prior to approval of the Head of Agency/LGU, the draft contract shall undergo review by the Office of the Government Corporate Counsel (OGCC), the Office of the Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs, and LGUs as provided in Section 4.4 of these Revised IRR. For projects of national government agencies, local projects which will involve funds of the national government, and local projects requiring ICC review/approval, the draft contract must also be reviewed by the Department of Finance (DOF) before the Head of Agency/LGU approves the same.</p> <p>The prescribed statutory counsel, and if necessary, the DOF, shall issue an opinion on the draft contract within ten (10) days upon receipt thereof.</p> <p>For solicited projects, changes in the terms and conditions of the draft contract after its approval by the Head of Agency/LGU may be allowed prior to submission of bids provided that the Head of Agency/LGU shall secure approval of the appropriate approving body for any of the following changes:</p> <ol style="list-style-type: none"> 1. changes which reduce the service levels to the public; 2. changes which reduce the economic internal rate of return below the hurdle rate used in the original analysis of the project; 3. changes which increase the total government subsidy to a project by at least five percent (5%) of the total project cost; and 4. changes in the risk profile which are detrimental to the 	<p>We understand that item (4) refers to adverse changes in the commercial terms, other than item (3). We suggest that more clarity is needed as to the meaning of “changes in the risk profile, detrimental to the best interests of the government.” While we recognize that this clause is intended to be a “catch all” phase to allow for approvals in changes in the risk profile, its overbroad nature may cause reasonably minor changes to delay project implementation. We would suggest that the clause include either a money limit (changes in the risk profile which may have a detrimental impact in excess of</p>

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AMENDED IRR PROVISIONS	COMMENTS ON THE AMENDED IRR OF THE BOT LAW
<p>best interest of the government.</p> <p>The concerned Head of Agency/LGU shall inform in writing the concerned statutory counsel as provided in this section of such changes.</p>	<p>P100,000) or a percentage similar to change 3 above to avoid minor impact changes from requiring time consuming approvals.</p>
<p>SECTION 4.4 - DRAFT CONTRACT</p> <p>The Head of Agency/LGU shall be responsible in ensuring the consistency of the draft contract with the parameters, terms and conditions as approved by the Approving Body.</p> <p>The draft contract should clearly define the basic and legal relationship between the parties and their rights and responsibilities including the specific Government Undertakings to be provided by the Agency/LGU relative to the project. The draft contract shall have the following mandatory terms or conditions:</p> <ol style="list-style-type: none"> 1. specific contractual arrangement, term, and scope of work; 2. project technical specifications and system features; 3. implementation milestones including those for securing other approvals, project completion date; 4. cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be; 5. liquidated damages as contemplated under Section 12.14; 6. performance and warranty bonds contemplated under Sections 12.8 and 12.9; 7. minimum insurance coverage as may be required for the project, such as Contractors' all risk, motor vehicle, workmen's compensation, third party liability, or comprehensive general liability insurance; 8. acceptance tests and procedures; 9. warranty period and procedures (after transfer); 10. grounds for and effects of contract termination including modes for settling disputes; 11. the manner and procedures for the resolution of warranty against corruption; and 12. compliance with all other applicable laws, rules, and regulations. <p>In accordance with Section 2.8, prior to approval of the draft contract by the Head of Agency/LGU, the Office of the Government Corporate Counsel (OGCC), the Office of the</p>	<p>Disbursement schedules and amount should be vetted by the Independent Consultant as being representative of the normal milestone pattern (S-curve) for the project. (This is not something to take lightly as disbursement patterns influence the level to which the project company is successful in pushing back construction risk on to the IA.)</p> <p>Suggested revised wording; minimum insurance coverage as may be required for the project, including but not limited to Contractors' all risk, motor vehicle, workmen's compensation, third party liability, or comprehensive general liability insurance</p> <p>10. Protocol related to the handover of assets, procedures to follow to ensure assets have been properly maintained, amounts to be withheld pending the completion of the protocol and which party / parties bear /s the cost of asset transferral.</p> <p>11. Creation of a Contract Management Committee representing the GPH and the Project Proponent.</p> <p>12. Events of default, cure periods and alternative</p>

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AMENDED IRR PROVISIONS	COMMENTS ON THE AMENDED IRR OF THE BOT LAW
<p>Solicitor-General (OSG) or any other entity prescribed by law/issuances as the statutory counsel of GOCCs and LGUs, and if necessary, the Department of Finance (DOF) shall issue an opinion on the draft contract within ten (10) days upon receipt by the corresponding counsel of the draft contract as submitted by the Agency/LGU.</p>	<p>dispute resolution mechanisms.</p> <p>10, 11 and 12 should be changed to 13, 14 and 15.</p>
<p align="center">SECTION 9.3 - CONDITIONS FOR NEGOTIATED PROJECTS</p> <p>In the instances where negotiated projects are allowed, the ICC shall determine the Reasonable Rate of Return prior to the negotiation in the case of solicited proposals as referred to under Section 9.1 of the Revised IRR. The scope of negotiation, in the case of solicited proposals referred to under Section 9.1 of the Revised IRR, shall be limited to the financial proposal of the proponent and compliance with the ICC-determined Reasonable Rate of Return. Direct negotiation should not result in a higher subsidy, or higher user fee, or lower amount of government revenue, or extend the concession period.</p>	<p>Subsidies are not allowed in unsolicited proposals. Hence we propose revised wording of the last sentence “Direct negotiation should not result in a higher subsidy, or higher use fee, or lower amount of revenue, or extend the concession period or provide for any subsidy for those projects expressly prohibited from receiving government subsidy as referred to in Section 9.1 of these Revised IRR.”</p>
<p align="center">Section 12.10 – Review of Project Construction, Operation and Maintenance</p> <p>The Agency/LGU may inspect and check, from time to time, the project to determine whether the project is constructed, operated and maintained in accordance with the approved plans, specifications, standards and costs under the contract.</p> <p>In the event that the Agency/LGU concerned shall find any deviation from or non-compliance with the approved plans, specifications and standards, it shall bring the same to the attention of the Project Proponent for the necessary corrective actions. Failure of the Project Proponent to correct the deviation within the time prescribed by the Agency/LGU may be a ground for the rescission/ termination of the contract, in accordance with Section 12.21(b) of these Revised IRR. Such technical supervision by the Agency/LGU concerned shall not diminish the singular responsibility of the Project Proponent for the proper construction, operation, and maintenance of the facility, nor does it transfer any part of that responsibility to the Agency/LGU.</p>	<p>Section 12.10 appears to refer to “technical inspection,” rather than the broader monitoring and coordination that is part of the PPP Center role.</p> <p>Nevertheless, there is no mention of the responsibility of the IA to keep the PPP Center copied on all its technical monitoring activities in this respect. PPP Center should have copies of all of the Independent Consultants periodic reports during construction and all of the reports by the IA during operations. Perhaps under PPP Center role as Monitoring and Coordination they can establish rules, regulations, procedures for IAs to provide PPP Center with technical and contractual documentation.</p> <p>The IRR may be clearer and more effective if it clarifies the role of the PPP Center as being responsible for coordinating or facilitating <u>all</u> monitoring that is done by other agencies, including the technical, regulatory and environmental monitoring; and that <u>all</u> related documentation in respect of this activity by any agency should be copied to it. See notes under SS 14.1 below.</p>

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AMENDED IRR PROVISIONS	COMMENTS ON THE AMENDED IRR OF THE BOT LAW
<p align="center">SECTION 12.11 - CONTRACT VARIATION</p> <p>A contract variation may be allowed by the Head of Agency/LGU, provided, that:</p> <ol style="list-style-type: none"> 1. There is no impact on the basic parameters, terms and conditions as approved by the Approving Body; or 2. There is no increase in the agreed fees, tolls and charges or a decrease in the Agency/LGU's revenue or profit share derived from the project, except as may be allowed under a parametric formula in the contract itself; or 3. There is no reduction in the scope of works or performance standards, or fundamental change in the contractual arrangement nor extension in the contract term, except in cases of breach on the part of the Agency/LGU of its obligations under the contract; or 4. There is no additional Government Undertaking, or increase in the financial exposure of the Government under the project. <p>Upon due diligence and recommendation of the Head or Agency/LGU, contract variations not covered by above shall undergo approval by the Approving Body in terms of the impacts on government undertakings/exposure, performance standards and service charges. Failure to secure clearance/approval of the Head of Agency/LGU or Approving Body as provided in this section shall render the contract variation void.</p> <p>The Agency/LGU shall report to the Approving Body and the PPP Center on any contract variations including those approved by the Head of Agency/LGU.</p>	<p>Any design variation during construction or operations, which is agreed to by both parties in a PPP Contract could result in an increase in tariff and / or may result in an increase in government exposure or undertaking. This is normally written into the PPP Contract and there should be no need to secure approvals, except to approve the level of tariff increase.</p> <p>Most PPP Contracts permit contract extensions on a day-to-day basis with the occurrence of a Force Majeure i.e., it is already contractually specified and there should be no need to secure approvals.</p>
<p align="center">Section 12.22 Venue for Litigation</p> <p>The venue for the resolution of disputes, arbitration or litigation shall be as mutually agreed upon by the parties to the contract. In default thereof, the venue shall be in the Philippines.</p>	<p>More guidance is needed with regard to the resolution of disputes, perhaps some combination of fixed provisions that apply to all contracts and variable provisions that need to be modified based on project typology. The wording in 12.21 incentivizes the IA to accept wording from the project company, without perhaps appreciating the ramifications of what the project company suggests.</p>

18. In summary, the above assessment of selected provisions within the IRR would suggest that,
 - a. PPP Center's role, under the Contract Administration function for PPP projects, requires better definition as it is ambiguous as to how its role relates to that of other agencies. It would be better to place it in a position where it is either fully in charge of coordinating the activity, working closely with other agencies; or, at the very least, entitled to receive all reports and empowered to follow up with its own inspections as and when necessary;
 - b. There are numerous omissions to the Revised IRR, the inclusion of which is important to achieving a successful and balanced project agreement, particularly in Sections 2.8, 4.4, 9.3, 12.10, 12.11 and 12.22.
19. PPP Center should develop a risk management framework. A risk management program for a PPP project has the purpose of developing a life-cycle risk management framework that results in the realization of VfM and a risk-reward balance between different stakeholders.
20. Risk management is essential in PPPs, in addition to ensuring VfM and protecting the public (and consumer's) interests. Optimal risk management begins during the project preparation stage, initially through considered risk identification, assessment, and carefully designed allocation of risks. That balance, determined at the project preparation stage, requires continuous risk management surveillance from a life-cycle perspective, during construction, commissioning, operations and expiration of the project agreement to ensure continued balance amongst all stakeholders.
21. At an early stage in the development of the project, even before the tender, the project monitoring team faces a number of planning challenges, including:
 - a. Noting the potential risks. It is started by making a list of the general risk categories of the project, and then carefully assessing each category. A full inventory of risks can be found in the current risk identification matrix that has been accepted by NEDA. Within each risk category, the team would determine and note what factors might increase each of the risk elements. Many, if not all, of the key risks will have been identified and analyzed in the feasibility study, along with the analysis of which are the most likely to occur and what the consequences would be;
 - b. Validating the most likely risks. Risks should be prioritized, that is, listed in the order of their likelihood and how much of an impact there will be on the project if the risk occurs;
 - c. Identifying potential steps that might be made to mitigate the risk, upon its occurrence. It is prudent to have plans in place that can reduce the prospects of a risk happening as well as actions that can mitigate its damage;
 - d. Identifying who is to undertake the planned actions in the event the project runs into one of these risks. Action plans and milestones should be developed to complete these actions;
 - e. Creating a clearly-defined risk management process should the project become at risk. The team should set forth actions and timeframes to ensure those involved in the project understand the risk management plan, how it's utilized and each person's function in the risk management process.
22. Other factors that can help develop a good risk management framework:

- a. The PPP method has been increasingly used to procure large-scale infrastructure in the Philippines and elsewhere. While there have been many successful PPP projects, unsuccessful cases abound and studying them can help people better manage the risks in future PPP infrastructure projects;
 - b. Take project risk management courses;
 - c. Studying and adopting elements of the project risk management plan templates that are available online;
 - d. Prioritizing the risks involved in each project. Time efficiencies can be wasted on a risk management plan that concentrates on risks that are unlikely to occur.
23. The PPP Center should have broader influence in Contract Administration. While rules generally are in accordance with the PPP law and IRR, implementing guidelines and specific detailed activities are required. The PPP Center and program generally would benefit if there were a detailed set of guidelines included in the NGA Manual governing PPP. Promulgating a revised manual should not be considered the end of the PPP Center's role. The PPP Center as the repository of these implementing guidelines has a responsibility for constantly updating manuals by reviewing and accepting changes requested by IAs and other agencies responsible for implementation. In addition, the PPP Center has a responsibility to monitor and review its guidelines to determine if IAs are following accepted practice and changing practices that are impractical.
24. Executive Order No. 8 has extended PPPC's mandate to include JVs, regardless of whether they come under the PPP or the BOT Laws.
25. NEDA JV Guidelines, though, impact upon PPPC's mandate under Executive Order No. 8. But, PPPC may find it difficult to expand its Monitoring function to JVs, since it is neither part of the preparation, contract review or enforcement. The relevant portions of the NEDA Guidelines are:
- a. These Guidelines were issued pursuant to Section 8 (Joint Venture Agreements) of Executive Order (EO) No. 423 dated 30 April 2005, which mandates the National Economic and Development Authority (NEDA), in consultation with the Government Procurement Policy Board (GPPB), to issue the necessary guidelines on Joint Ventures (JVs). The Office of the Government Corporate Counsel (OGCC), Department of Justice (DOJ), GOCCs and the private sector were also consulted in the formulation of the Guidelines.
 - b. An original signed copy of the contract shall be submitted to:
 - i. The Office of the President;
 - ii. NEDA;
 - iii. Statutory Counsel;
 - iv. GPPB; and
 - v. DOF in case of GOCCs and GFIs, and DBM in case of other entities.
 - c. Subject to the charter of the Government Entity concerned, no further and higher approval is necessary, unless the same is required by Law to be acted upon by the President. In which case, the procedure stipulated under Section 6 (Government Contracts Requiring Presidential Action and/or Approval) of EO No. 423, as amended by EO No. 645, shall be followed. Upon approval of the JV Agreement, the Government Entity concerned shall adhere to the requirements of Section 10 (Submission of Government Contracts) of the same EO, as deemed applicable (Guidelines Part X, 1).

5.0 INTERNATIONAL PRACTICE

26. Detailed operating guidelines in respect of contract management do not appear to be available on the respective PPP sites for Australia, Canada, India and European Union (EU). With minor exceptions however, one finds the principles for justifying a robust Contract Management function. The most often mentioned principle in this regard is the need to ensure continuing VfM over the operating phase of the project. Other rationales mention the requirement to ensure compliance with project agreements, the finance documents, asset condition and other obligations.
27. The organization, staffing and institutional location of a typical Contract Management function appears to vary somewhat. For example, the EU issues general guidance for all its twenty-seven member countries but seems to leave the operating detail to the latter.
28. The following summarizes the key points in each set of Guidelines;

India

29. India issues specific guidance relative to each organization. In India, the IA is to set up a project management unit (PMU), which will be responsible for monitoring the project. The unit reports to a "...Performance Review Unit (PPP PRU), headed by an officer not below the rank of Joint Secretary located at the level of the Central Ministry / State Government/ statutory entity for reviewing the monitoring of all PPP projects within its jurisdiction."² This is interpreted to mean that the PMUs in each IA report to a designated central unit which is responsible for reviewing reports, maintaining documentation and ensuring follow-up.
30. The PMU, itself, is responsible for developing a PPP Project Monitoring Report, which is submitted to the PPP PRU on a monthly basis, within 15 days of the close of the relevant month.
31. The report contains the following information (italicized terms found in parenthesis attribute Philippine meaning to the terms used³):
 - a. Compliance with the conditions precedent and achievement of financial close within the period specified in the concession agreement (*PPP Contract*);
 - b. Adherence to the time lines and other obligations specified in the concession agreement (*PPP Contract*);
 - c. Streamlining of, and adherence to, the reporting procedures between the concessionaire (*PPP project company*) and the Project Authority (*IA*), which may also include an MIS;
 - d. Assessment of performance against laid down standards (*MPSS*);
 - e. Remedial measures and action plans for curing defaults, especially when performance standards (*MPSS*) are not fulfilled;
 - f. Imposition of penalties in the event of default;
 - g. Levy and collection of user charges based on approved principles (*parametric formula*);

² Secretariat for the Committee on Infrastructure, *Guidelines for Monitoring of PPP Projects*, May 2009, Sections 7.1-7.11, pp. 9-11

³ Ibid

- h. Progress of on-going disputes and arbitration proceedings, if any; and
 - i. Compliance with the instructions of the Project Authority (*IA*) or Independent Engineer (*Independent Consultant*), as the case may be.
32. The PPP PRU reviews the PPP Project Monitoring Reports submitted to it and oversees or, initiates, action for rectifying any defaults or lapses. Moreover,
- “...T(t)he PRU should also prepare quarterly reports on the status of such PPP Project. These reports should, in particular, focus on any non-compliance relating to the provisions of the relevant contract, especially in terms of the standards of performance ((*MPSS*) or loss to the public exchequer and the users. It should clearly indicate the steps taken or required to be taken by the Project Authority (*IA*) in accordance with the provisions of the relevant contract. The PRU will submit its quarterly report to the competent authority⁴.
33. The quarterly report should, according to the same source, include:
- a. A compliance report regarding implementation of the various PPP projects as per the provisions of the respective contracts;
 - b. An ‘Exception Report’ highlighting issues where remedial action is to be taken for enforcing the provisions of the respective contracts;
 - c. A review of the grievances of users and the manner and extent of their redressal; and
 - d. Matters affecting the interests of the public exchequer in relation to the expenditures and revenues arising from the PPP project⁵.
34. Illustrative formats of the Reports submitted by PPP PMU and PPP PRU can be found in Annexes-I and II of the referenced Guidelines. Note that the instructions specify that these are indicative in nature only. The users of the report are expected to evolve the required formats for each project separately.⁶ The Indian Guidelines make a point of indicating that each authority has the responsibility to evolve its monitoring activity to fit the requirements of the project. Guidelines, therefore, are assumed to be dynamic in nature, to be changed or amended according to circumstances.
35. EU Guidelines on what is to be monitored are much more specific as discussed below.

European Union

36. While the EU Guidelines are not instructive with regard to institutional arrangements, they are quite specific on what is to be monitored. The scope of work related to the monitoring activity is quite detailed and focuses on the following areas, which are directly quoted from the indicated reference:
- a. **Output Specifications** – establishing that the required levels of performance and the associated information requirements for judging service performance, are capable of objective measurement and are being met;

⁴ Ibid

⁵ Ibid

⁶ Ibid

- b. **Payment** arrangements – enforcing and monitoring the payment mechanism, including the conditions required for the commencement of payment and the basis for ongoing certification (frequency, measurement basis, variations, and specific conditions);
- c. **Financial performance** – reviewing the ongoing financial performance and position of the Contractor against the forecasts set out in the financial model and enforcing and monitoring any arrangements for revenue sharing or profit capping. (**NOTE:** This would appear to be an efficient way of monitoring compliance with the finance documents, also, without the need unless it becomes imperative, to discuss the issue with the Agent Bank);
- d. **Monitoring arrangements** – involving the defined monitoring obligations of the Contracting Authority (IA) and the Contractor (*PPP Project Company*), the provision of facilities for monitoring by the Contracting Authority, and the procedures for determining compliance. (**NOTE:** that this aspect would imply that the entity that monitors is different from the IA, an arrangement similar to that being discussed in the Philippines);
- e. **Security and insurance** – monitoring compliance with specific conditions in relation to insurance policies, indemnities, tax clearance certification, safety procedures and systems;
- f. **Management of interactions** - managing all of the interfaces between the operations of the Contractor and those of the Contracting Authority. These interfaces may cover network management issues, the effects of new planning and development and the regulation of existing development (for example, waste collection and discharge licenses);
- g. **Dispute resolution** – providing mechanisms for problem solving and dispute resolution where and when appropriate. (**NOTE:** the mechanisms for problem solving and dispute resolution should be identified in the project agreement, not as this implies, on an ad hoc basis);
- h. **Compliance** - setting out the arrangements for dealing with non-compliance by the Contractor including enhanced monitoring, proposals for rectification and payment deductions;
- i. **Contingency for default** - arrangements to cover default on the part of the Contractor, or its subcontractors, where the continued delivery of the service is at risk, including step-in rights;
- j. **Change management** – implementing and managing the procedures and protocols for dealing with changing requirements over the life of the project. (**NOTE:** This would appear to cover aspects of Contract Administration, probably working closely with the IA); and
- k. **End of contract conditions** – dealing with maintenance, the condition of the assets at the expiry of the contract period and the ability of the Contracting Authority to re-tender for the provision of the service.

Australia

37. For Partnerships Victoria, the Guidelines are very broad and general. A footnote at the beginning of the section related to the Section styled, “Performance Monitoring and Review,” indicates that the monitoring system described is but one aspect of the broader project and contract monitoring, but there is no further information available regarding the full scope and content of this monitoring activity.⁷ A key point made in the section is that “the private party must monitor its own performance (including its compliance with KPIs set

⁷ See National PPP Guidelines, Supplemented with Partnerships Victoria Requirements, Volume 3, commercial Principles for Social Infrastructure, December 2008, Footnote 43

forth in the project agreement) and must warrant that each report is materially accurate.⁸ Each report, of course, is subject to rights of review and audit by government.⁹

38. Reporting is monthly, as is the case with India and EU. Reports are delivered through the Contract Administrator to the monitoring unit, which would suggest that the latter is separate from the IA. Monitoring costs incurred by government are to be assumed by the latter, except for those audits that are occasioned by information that is subsequently found to be faulty or incorrect.¹⁰ In those cases, government has the right to appoint its own auditor but there is no information as to whether the auditor is a private or public body.¹¹ Monitoring rights available to government include customer service surveys, scheduled and unscheduled reviews and inspections and feedback from facility users as to the “adequacy and quality of the facility or the contracted services.”¹²
39. Table 2, below, provides an overview of what is known of the institutional arrangements and comparative approaches to PPP project monitoring in India, Australia and EU, along with some preliminary recommendations for “best practices” to be adopted by the PPP Center in Philippines.

Table 2
Best Practice Operational Characteristics
For PPPC to Emulate

Operational Characteristic	India	EU	Australia	Comments Regarding Best Model for PPPC
Institutional Location of Monitoring Activity?	PMU – within IA PRU – outside IA (centralized body)	Outside IA, but presumably some input from IA	Outside IA, but presumably some input from IA	Similar but not exactly the same as India
Frequency of reporting?	Monthly	Monthly	Monthly	PPPC uses quarterly approach, but in reality M&E is constant regardless of the periodicity of reporting
Scope of work – monitoring activity?	<ul style="list-style-type: none"> Monitoring activity is broad-based, leaves details to PMU and PRU to develop based on project and its circumstances 	<ul style="list-style-type: none"> Specific and detailed scope of work, as shown above. Other guidance materials indicate that monitoring activity should include ex post evaluations but not clear whether this is done 	Similar to India, guidelines are broad-based, details to be developed by monitoring body based on project and its circumstances	<ul style="list-style-type: none"> EU approach would appear to be best for PPP Center. However, the performance monitoring process needs to be dynamic and under constant review because project circumstances undergo change over time

⁸ Ibid, Section 13.1.2, p.43

⁹ Ibid, Section 13.1.3, p.43

¹⁰ Ibid, Section 13.3.3, p.45

¹¹ Ibid, Section 13.3.2 p.43

¹² Ibid, Section 13.3.2. p.44

POLICY BRIEF CONTRACT MANAGEMENT

Operational Characteristic	India	EU	Australia	Comments Regarding Best Model for PPPC
Who bears the cost of monitoring?	PPP project company and government, each picking up its own share, except for audits caused by incorrect information	PPP project company and government, each picking up its own share, except for audits caused by incorrect information	PPP project company and government, each picking up its own share, except for audits caused by incorrect information	Should be similar to examples
Partial reliance on KPIs	<ul style="list-style-type: none"> • Yes, but depends on project • PPP Project Company to warrant accuracy 	<ul style="list-style-type: none"> • Yes, but depends on project • PPP Project Company to warrant accuracy 	<ul style="list-style-type: none"> • Yes, but depends on project • PPP Project Company to warrant accuracy 	Should be similar to examples
Other monitoring rights of Government, besides performance data required from PPP project company?	Unclear	Unclear	Specifically include customer satisfaction surveys, scheduled and unscheduled reviews, feedback from users, etc.	Similar to Australia
Use of Operating Committee?	Unclear	Unclear	Creates operating committee during construction and operations for purposes of maintaining communication and taking joint actions when needed –two reps from PPP Project company, two reps from IA, chaired by Contract Administrator (IA)	Similar to Australia

6.0 RECOMMENDATIONS

Roles, Responsibilities and Operational Characteristics of Contract Management Function

40. The Revised BOT Law IRR is not explicit with regard to the definitional content of the Contract Management function, particularly as it relates to Contract Administration. The following examples were cited and recommendations offered:
 - a. The IA is the Contract Administrator, but it is not clear from the Revised BOT Law IRR who oversees its functions if the project becomes distressed, or it becomes necessary to negotiate changes in the project agreement, base case financial model or if a dispute resolution event takes place;

- b. **DOF** approves the PPP Contract's commercial terms before the project breaks ground, and (although the Revised IRR is silent on the matter) it **should also review and recommend to the approving body any changes in the contract, or the base case financial model, that become necessary after Financial Close**. This ensures that there is oversight to the financial aspects of the Contract Administration function;
- c. **The PPP Center** should monitor and coordinate the IAs compliance to the PPP Contract. Although the Revised BOT Law IRR is also silent on the matter, **the PPP Center should have a role to play if, after Financial Close, there are changes in the base case financial model and DOF requires assistance in validation, consistency, or other form of verification**;
- d. **The PPP Center should have a role in establishing and amending Contract Administration procedures**. This role as described above includes developing a comprehensive set of guidelines that serve as both an instruction platform and a checklist for IA Contract Administration. Further, PPP Center has a responsibility for review, analysis and update of the procedures both from direct requests from IAs and internal reviews of common practice;
- e. The definition and determination of PPP Center's role in Contract Administration was discussed extensively during the Stakeholders' Consultation held on 11th and 12th December 2012. It was generally agreed that the PPP Center is the body that is best placed to provide guidance and support for VfM analyses and risk sharing following the NEDA model. Further, the Consultation consensus was clear in discussing the role of the PPP Center after contract close; where Government has not provided financial support then Government should not seek to redress tariff if debt refinancing produces an unforeseen gain during the project life cycle. Any refinancing gain must either be a part of the initial contract or be to the benefit of the Private Proponent.

Future Amendments to the IRR

- 41. GHD suggests that the Revised BOT Law IRR employ definitions and technical terms that are more consistent with international practice. Table 1 in the main text summarizes a number of drafting errors and omissions in the Revised BOT Law IRR that should be rectified at the first opportunity, to avoid any confusion with project sponsors. With regard to definitions, the concepts discussed in this Policy Brief and relevant terms such as Contract Management and Contract Administration, need better definition, so that responsibility and oversight responsibility can be properly allocated. There are numerous omissions in the Revised IRR which are important to achieving a successful and balanced project agreement, particularly as noted above in our analysis of omissions in Sections 4.4, 9.3, 12.10, 12.11 and 12.22.
- 42. As an addition to the Revised BOT Law IRR, GHD recommends that it should **be made a matter of law that all agencies that have monitoring rights over project construction and operations (e.g. the IA [during construction and operation], the Independent Consultant [during construction], DENR [during operations] and regulatory bodies [during construction and operations] be required to provide the PPP Center with copies of all reports issued by them related to the PPP project, so that there can be one central repository** where all relevant information in respect of a particular PPP project is available. In the interim, we suggest that an EO be issued that requires IAs to provide the PPP Center with all documents on all PPP projects under their purview.

43. **Risk management methodology is a priority for the PPP Center. It should monitor and evaluate risks that have been allocated in the project agreement, risks that may arise from the re-negotiation of the project agreement and, if relevant, any implicit risks assumed by GPH as a result of the PPP undertaking.** Copies of such assessments and, in particular, any changes or potential changes in the risk configuration of a PPP project should be brought to the attention of the DOF and noted by them. The Revised BOT Law IRR needs more guidance in this area.
44. It is noted that the Stakeholders' Consultation discussed risk assessment modelling and agreed, that the Private Proponent should be allocated all market risk without interference by Government for all PPP contracts where Government does not provide financial support. However, where Government provides VGF or other forms of support or subsidy, then there was a strong case for government to receive its "Revenue Share" of any post-contract operations refinancing gains, or excess gains unanticipated during the contracting phase. Any "Revenue Share" should be allocated to Government based on its proportion of overall project support.

Joint Venture Agreements

45. Despite the Joint Venture Law requiring a separate set of guidelines and approvals, there is basis to say that a JV can be included under BOT Law as a contractual arrangement, subject to approval of the President. The contract category list included in the BOT Law is not exhaustive or exclusive, but new modes must have Presidential approval. With the promulgation of the NEDA guidelines on JV, which does not extend to LGUs, JVs effectively fell outside of the BOT Law.
46. If the intention of EO 8 was to include JVs as a PPP modality or contractual arrangement under the BOT Law, some alterations to existing laws are needed. Those options include:
 - a. amend the law to expressly include JV as a BOT contract;
 - b. amend the BOT Law IRR;
 - c. get executive issuance from Office of the President approving inclusion of JV as a BOT contract category, each of which should entail revocation of the current NEDA Guidelines.
47. Furthermore, at present, except for LGUs, JVs do not come within the PPP mode under BOT law. The applicable rules for JVs can be found in the NEDA JV Guidelines. The NEDA JV Guidelines do not recognize nor do they refer to the BOT Center or PPPC.
48. PPPC's mandate for monitoring and coordinating PPP projects is founded on BOT Law and section 14.1 of revised IRR. The IRR requires PPPC to monitor projects under contractual arrangements or schemes authorized under the revised IRR, which currently excludes JVs. Under the same provision, las must submit reports to PPPC.
49. PPPC's mandate is extended to JVs by virtue of EO 8. PPPC is bound to comply with EO 8, but since EO 8 does not specifically require the PPPC to implement the monitoring function for JVs and does not supersede the NEDA JV Guidelines, PPPC must reconcile its functions with what the NEDA JV Guidelines provide. The Guidelines do not require the JV or the IA to report to PPPC. To comply with EO8 and to ensure that the NEDA JV Guidelines are consistent with the meaning and intent of EO8, there has to be a policy decision first on JVs and pending that decision, determine the role of PPPC in JVs.

50. As we noted in our 'Review of the PPP Institutional Set-Up in the Philippines' Policy Paper, paragraph 3.2.2 headed *Joint Ventures: Current Guidelines for PPP and other Structures*, we discuss many of the issues related to JVs noted above. Our general conclusions noted that the JV law was inconsistent with EO 8, the PPP Law and its IRR but did not specifically revise the PPP Law and its IRR to provide PPPC with the responsibility for JVs in any area. The Institutional Set-up Paper however, noted that the Government was currently in process of revising the Joint Venture Regulation, EO No. 423,¹³ and the JV Guidelines. In addition, the Government is reviewing the BOT Law and we understand that the Government intends on removing the current JV constraint on PPPC.
51. As we noted above, at present PPPC does not have the legal authority to monitor JVs as PPP projects. However, we recommend and encourage the GPH to move swiftly to revise the JV Law and the BOT Law to accommodate JVs as the BOT structure and hence provide authorization for PPPC to implement the role mandated by EO 8.

DRAFT

¹³ Repealing Executive Order No. 109-A dated September 18, 2003 Prescribing the Rules and Procedures on the Review and Approval of all Government Contracts to Conform to Republic Act No. 9184, otherwise known as "The Government Procurement Reform Act," (2005).